In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 269

SOLITE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question here is what constitutes petitioner's "gross income from mining", which is its base for the percentage depletion allowance under Section 613 of the Internal Revenue Code of 1954. In this case the controversy is controlled by a determination of the point at which the operation of petitioner's business ceases to be "mining," which Section 613(c)(2) defines to include "ordinary treatment processes * * * applied * * * in order to obtain the commercially marketable mineral product or products * * *."

Petitioner extracts weathered soft slate from the ground, crushes it, and converts the crushed slate into a lightweight aggregate by a kiln process which

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causes bloating and chemical changes. Petitioner then crushes the aggregate and sells it under the trade name "Solite" for use in the manufacture of building blocks and the like. Petitioner contends that its kiln process is a mining "treatment process" within the purview of Section 613(c)(2), and hence that its gross sales receipts less only the income attributable to crushing the aggregate constitute its depletable "gross income from mining". The district court and the court below rejected this contention, holding that petitioner's mining processes terminated prior to the kiln process.

This ruling is a correct application of criteria established by this Court in *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76, and *Riddell* v. *Monolith Cement Co.*, 371 U.S. 537. There is neither a conflict in decisions nor any other appropriate ground for further review by this Court.

1. Petitioner's primary contention is that its post-kiln lightweight aggregate is its first "commercially marketable mineral product" within the meaning of Section 613(c)(2); that the crushed weathered soft slate is not "commercially marketable" in the statutory sense because there is no evidence of actual sales of the material in this form. This contention is unsound.

This Court has made clear that actual sales of, or markets for, a raw mineral material are not prerequisites of commercial marketability. A mineral is deemed "commercially marketable" for depletion purposes "at the point where the mineral first became suitable for industrial use or consumption". *Riddell* v. *Monolith*

Cement Co., supra at 538. Evidence of actual sales is one form of "conclusive proof" that a mineral is "ready for industrial use or consumption", *United States* v. *Cannelton Sewer Pipe Co., supra* at 86; but the absence of such sales or a readily available market does not require the converse conclusion.

A process that physically and chemically transforms a raw mineral into a new and more valuable product is a manufacturing process, not a mining process, albeit employed by integrated miner-manufacturers who do not buy and sell the raw material. When a mineral is ready for manufacturing processes and in shipping form, so that it could be delivered to any manufacturer making the same product, it is ready and suitable for industrial use or consumption, and therefore "commercially marketable" within the meaning of Section 613(c)(2). The absence of a market where sales of the raw material may be made at a profit is immaterial. The integrated miner-manufacturer is deemed to be his own market or customer and his depletion basis is limited to the constructive income from the raw mineral in shipping form—the raw fire clay and shale in *Cannelton,* the crushed limestone in *Monolith,* and the crushed slate in the case at bar. Accord, *United States* v. *Longhorn Portland Cement Co.,* 328 F. 2d 491 (C.A. 5); *Virginia Greenstone Co.* v. *United States,* 308 F. 2d

669 (C.A. 4); *United States* v. *Light Aggregates, Inc.*, 343 F. 2d 429 (C.A. 8).[1]

In the instant case the record shows, and the court below found, that petitioner's crushed slate was ready for delivery to and consumption by its competitors in the manufacture of lightweight aggregate (R. 44a, 53a; Supp. R. 108–109).[2] Moreover, some of petitioner's competitors purchase their minerals in pre-kiln form rather than mine it themselves (Pet. 16a).[3] And petitioner itself leases some quarries and pays royalties for the raw mineral extracted (Supp. R. 111–112, 130–131). Thus, in the light of the applicable criteria, the record amply warrants the ruling of the court below that petitioner's crushed slate

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[1] In *Monolith* the Ninth Circuit had ruled in favor of the taxpayer (an integrated miner-manufacturer of cement) on precisely the same ground petitioner urges here, that the absence of an actual market for the taxpayer's raw mineral distinguished the case from *Cannelton* and required the conclusion the raw material was not "commercially marketable". 301 F. 2d 488. In reversing, this Court did not deem the matter of actual sales sufficiently important to discuss in the text of its opinion, merely observing in a footnote that there were sales of crushed limestone for purposes other than the manufacture of cement. (371 U.S. 539.)

[2] "R." refers to the appendix to the brief for the Appellant filed in the court of appeals; "Supp. R." refers to Appendix B to the brief for appellee filed in that court.

[3] Petitioner is the only producer of lightweight aggregate using weathered soft slate as the raw material; its competitors use clay, shale and other types of slate which are also used by petitioner's subsidiaries (R. 28a–32a). But lightweight aggregate is essentially the same product of the same process, whatever the raw material. Lightweight aggregate is made by a heating process referred to as incipient fusion, here effected through the use of the rotary kiln (R. 33a). The only difference between the product made from clay and that made from slate is in color (R. 29a).

was the "commercially marketable" end-product of petitioner's mining processes.

2. Petitioner also contends that its kiln process is a "sintering" process[4] within the meaning and context of Section 613(c)(4)(C), which, "in the case of * * * minerals which are customarily sold in form of a crude mineral product" provides that mining processes include "sorting, concentrating, and sintering to bring to shipping grade and form * * *."

Kiln processes are a form of "sintering". However, it is clear on the face of the statute that "sintering to bring to shipping grade and form" refers back to customary sales of crude minerals, and contemplates only those "sintering" processes which ready the crude mineral for shipment and manufacture, *i.e.*, make it "suitable for industrial use or consumption" in the language of *Monolith. United States* v. *Cannelton Sewer Pipe Co., supra* at 84–86; *United States* v. *Longhorn Portland Cement Co., supra* at 496.

As the District Court found, petitioner's kiln process is *not* the sort of sintering process described in Section 613(c)(4)(C), but rather is a manufacturing process which comes after the material is suitable for sale and transforms the crude mineral, both physically and chemically,[5] into an entirely new prod-

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[4] "Sintering" generally refers to a heating process which, without melting, agglomerates fine otherwise unmanageable particles into a bloated coherent mass.

[5] "Sintering" may be used to agglomerate fine particles for shipping purposes without otherwise affecting the chemical or physical nature of the mineral, as in the case of powdered phosphate rock. See Hearings before the Senate Committee on Finance on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., Pt. 3, pp. 1334–1338.

uct, *United States v. Cannelton Sewer Pipe Co., supra,* p. 86; *United States* v. *Light Aggregates, Inc., supra.*

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
GRANT W. WIPRUD,
THOMAS L. STAPLETON,
Attorneys.

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